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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-403

DAYTON BOARD OF EDUCATION, ET AL.,

Petitioners,

v.

MARK BRINKMAN, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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STATUTE

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OPINIONS BELOW

The opinion of the Court of Appeals remanding the case to the District Court for further consideration (Pet. App. 89a-96a) is reported at 518 F.2d 853 (6th Cir. 1975). The District Court's order (Pet. App. 73a-88a) is not reported. Prior opinions and orders of the District Court (Pet. App. 1a-31a) are unreported. The Court of Appeals' prior opinion affirming but remanding with directions (Pet. App. 32a-69a) is reported at 503 F.2d 684 (6th Cir. 1974).

JURISDICTION

The Court of Appeals' judgment remanding the case to the District Court (Pet. App. 97a-98a) was rendered on

June 24, 1975. This Court's certiorari jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether any issue warranting this Court's review is presented by the Court of Appeals' remand of this school desegregation case with directions that the District Court reconsider the remedy in the light of *Keyes v. School District No. 1*, 413 U.S. 189 (1973) and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and the Court of Appeals' previous mandate.

STATEMENT

This is a school desegregation action against city and state officials having responsibility for the maintenance and operation of the public schools of Dayton, Ohio. The action was commenced in April 1972. After an evidentiary hearing, the District Court in February 1973 found a constitutional violation (Pet. App. 12a)—on the basis of its findings that there was substantial segregation in the racial composition of Dayton schools; that defendants had utilized optional or dual attendance zones; and that other board action, both historic and recent, also contributed to the segregation.[1] The District Court held "that the totality of these findings require intervention by this Court under the mandate of *Brown v. Board of Education*" (Pet. App. 12a). Accordingly, the District Court directed the school board to prepare a plan for desegregation (Pet. App. 13a, 34a).

[1] E.g., the illegal rescission, during the 1971-72 school year, of a system-wide program of desegregation (Pet. App. 10a-11a); explicit "physical segregation" of teachers, pupils, facilities and programs among and within schools pre-*Brown* (Pet. App. 2a-3a); intentional creation and maintenance of the Dunbar High School as a city wide, all-black school (Pet. App. 4a-5a).

Separate plans were submitted to the Court by a majority of the membership of the Dayton Board of Education and by a minority thereof. The plan presented by the board majority proposed to eliminate dual zones, to revise priorities for permitting free choice transfers, and to provide certain part-time integration in specialized programs such as science, vocational training, music, and athletics (Pet. App. 35a-36a). The board minority submitted its own more comprehensive plan in the belief that the plan of the board majority would maintain the status quo (Pet. App. 36a). In July 1973 the District Court, while expressing disappointment at the limited nature of the board majority's proposal (Pet. App. 27a), essentially accepted that plan with the proviso that the board adopt a freedom-of-choice method of assigning students to high schools. Plaintiffs (here the Respondents) appealed; and the defendants (here the Petitioners) cross-appealed.

On August 20, 1974, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's ultimate finding that the Dayton schools were unlawfully segregated by race (Pet. App. 56a). In addition to the evidence specified by the District Court as part of violation (Pet. App. 39a-56a), the Court of Appeals also reviewed defendants' other discriminatory practices promoting and perpetuating racial segregation in the assignment of faculty and staff (Pet. App. 56a-61a), in the location and construction of new schools (Pet. App. 61a-64a), in the reorganization of grade structures (Pet. App. 64a-65a), and in student transfers and transportation (Pet. App. 65a-66a).[2] The Court of Appeals

[2] For example, the Court of Appeals noted that prior to 1951 faculty and staff were assigned on a racial basis "pursuant to an

[footnote continued]

concluded that "the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations" (Pet. App. 68a) and remanded the case for further remedial steps consistent with *Swann, Keyes* and *Milliken (Id.)*. Certiorari was not sought.

Following remand of the case, the board majority and the plaintiffs each presented separate plans to the District Court. The board majority plan (see Pet. App. 91a-92a) is, frankly, difficult to describe. It is, however, essentially a limited expansion of the prior plan—a modified freedom of choice plan calling for the establishment in some schools of programs not offered in others. These special program schools would be called "magnet schools" and "learning centers." The programs offered were to be designed to attract a limited bi-racial enrollment on a voluntary and, in the main, part-time basis (see Pet. App. 91a-92a). In contrast, the plaintiffs' plan used traditional techniques of rezoning, pairing, and grouping of schools. On March 10, 1975, while expressing confusion over the applicable law, the District Court provisionally accepted the board majority's plan for the 1975-1976 school year (Pet. App. 83a). The District Court recognized the very limited nature of the proposals, as well as the school board's failure to consider more promising alternative methods of accomplishing desegregation (Pet. App. 80a-81a). The board was directed to study the feasibility of adopting more signifi-

explicit segregation policy of the Board . . ."; thereafter a new policy "effectively continued in practice the racial assignment of faculty through the 1970-71 school year" (Pet. App. 56a). With respect to school construction, the Court of Appeals noted "that in the period of greatest expansion of the Dayton school system, from the late 1940's to the mid-1960's, the great majority of new schools and additions were located by the Board in either virtually all black or all white areas" (Pet. App. 62a).

cant measures for the following school year (Pet. App. 81a).

The plaintiffs immediately appealed, moving for summary reversal and requesting specific remedial directives from the Court of Appeals; for after two years' experience with the Dayton Board's prior special programs and part-time desegregation, the systematic pattern of segregation had remained unchanged. The defendants did not cross-appeal.

In its opinion the Court of Appeals, to clear-up the District Court's confusion, first summarized the nature of the violation and the applicable law in this case:

> Segregative acts and practices were found to have occurred both before and after the decision of the Supreme Court in *Brown v. Board of Education,* 347 U.S. 483 (1954), and to have continued down to the present time. These findings of fact as to segregative practices in Dayton are set forth in detail in our former opinion. . . . Sufficient to say that . . . [these] findings of fact . . . are supported by substantial evidence.[3] Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation

[3]The evidence of constitutional violation is more than substantial. For example, the evidence shows that just priot to *Brown* over half of the black students and all of the black teachers were isolated in four *all*-black schools as a direct result of the Board's intentionally segregative practices (Pet. App. 39a, 50a, 56a) and that, thereafter, staff continued to be assigned on a racial basis (Pet. App. 56a), new schools and additions opened almost always on a virtually uniracial basis (Pet. App. 62a), racially dual optional zones operated at one time or another to directly effect segregation at over 30 schools (e.g., Pet. App. 53a), and the Board deliberately chose in 1971 to perpetuate this pattern of segregation system-wide (Pet. App. 55a).

> practices. See *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

(Pet. App. 89a-90a). The Court also reiterated that its previous remand therefore required formulation of a desegregation plan "consistent with the remedial guidelines" in *Swann* and *Keyes* (Pet. App. 90a).

The Court of Appeals then recognized the inadequate scope and very modest nature of the District Court's "remedy." After describing the plan (Pet. App. 91a-92a), the Court of Appeals said:

> This is essentially all the relief afforded by the District Court for the 1975-76 school year. . . . We believe, however, that more is required by the Constitution, by recent decisions of the Supreme Court . . ., and by the previous mandate of this Court. . . . [U]nder the plan approved by the District Court the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools . . ., [and] the vast majority of one-race schools will remain identifiable as such.

(Pet. App. 92a-93a). However, in the Court of Appeals' view, insufficient time remained before the commencement of the 1975-76 school year for development and implementation of a comprehensive desegregation plan (Pet. App. 95a). Accordingly, the Court of Appeals neither affirmed nor reversed the order of the lower court, but merely remanded the case to the District Court for further proceedings, with directions, *inter alia*, "that the District Court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*" (Pet. App. 96a). The Court of Appeals directed that such a plan be

adopted by December 31, 1975, for implementation in September 1976.[4]

Defendant Dayton Board of Education now petitions for a writ of certiorari to review this judgment which merely remands the case for further proceedings, consistent with both the constitutional principles announced by this Court and with the law of the case as set forth in the Court of Appeals' prior opinion.

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Court is properly chary about exercising its discretion to review interlocutory decisions of courts of appeals, particularly where the remand directs further, substantive proceedings in the trial court. *See, e.g., Brotherhood of Locomotive Firemen and Engineermen v. Bangor and Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-258 (1916); and *American Construction Co. v. Jacksonville, T & K. R. Co.*, 148 U.S. 372, 384 (1893). And this case is particularly inappropriate for interlocutory review.

Both courts below held that the Dayton public schools are unlawfully segregated. Both courts recognized the

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[4]The Court of Appeals also directed that the plan previously approved by the District Court be modified prior to the 1975-76 school year with respect to the proposed reassignment of the all-black Miami Chapel Elementary students to other all-black schools, and with respect to as many of the other *de jure* segregated, one-race schools "as feasible" (Pet. App. 95a-96a). With the exception of the Miami Chapel situation, the District Court on remand ordered no modifications for the current school year. Plaintiffs filed further proceedings in the Court of Appeals to challenge the District Court's refusal to act. These further appellate proceedings, however, are not a part of Petitioners' present request for review by this Court.

need for development of steps toward desegregation in addition to the Petitioners' plan of voluntary and part-time "desegregation" for limited numbers of students. The District Court found that the Petitioner Dayton Board failed to consider "whether adjustments of existing school attendance zones would reduce concentrations of black and white attendance,"[5] "whether feasible pairing or clustering of schools could be accomplished," or whether other "numerous desegregation techniques . . . have been fully investigated" (Pet. App. 81a). Where the Petitioners have not cross-appealed from such a determination; where Petitioners apparently argue in this Court that such findings are critical (Pet. 14,17); and where the Court of Appeals has remanded for consideration of these very issues in light of its previous remand and this Court's controlling decisions in *Swann* and *Keyes*, there can be no warrant for review at this time.[6]

2. With respect to questions raised by the Petitioners concerning the nature of the constitutional violation and the scope of an adequate remedy, the Court of Appeals has adhered scrupulously to the decisions of this Court in *Swann, Keyes,* and *Milliken.* There is no conflict with the

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[5]We believe, however, that all parties concede that reliance solely on "walk-in" schools is insufficient.

[6] Perhaps the most significant modification of the District Court's order made by the Court of Appeals was to direct a specific deadline of December 31, 1975 for the District Court's consideration and adoption of a new desegregation plan for the 1976-77 school year. Since the Court of Appeals' directive is the least of the plaintiffs' entitlement, see *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969); *Carter v. West Feliciana Parish School Board,* 396 U.S. 226, 290 (1969), the Petitioner's purpose here might well be doubted. This Court ought not countenance any attempt to forestall timely compliance with the Court of Appeals' restrained directive by the pendency of this petition for writ of certiorari.

decisions of this Court, the Sixth Circuit, or any of the other Courts of Appeals. To the contrary, the judgment of the Court of Appeals is, manifestly, correct.[7] As in many other cases presented to this Court where school segregation was not originally mandated by explicit state law or local ordinance, *de jure* segregation has been found in the actual practices of school authorities, and system-wide desegregation has been directed. Such finding and direction here no more give rise to issues worthy of review than did the numerous petitions of other school boards involved in so-called "Northern" or non-statutory, but intra-district school segregation cases. *See, e.g., United States v. School District No. 151,* 432 F.2d 1147 (7th Cir. 1970), cert. denied, 402 U.S. 943 (1971); *Davis v. School District,* 443 F.2d 573 (6th Cir.), cert. denied,

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[7]In an attempt to suggest some conflict or issue worthy of review, the Dayton Board points to the District Court's statement, on the first remand, that "at no time . . . did [the Dayton Board] maintain a dual system of education." See Pet. 2, 10, 15-16. The purported conflict and issue, however, relate to the District Court's confusion concerning the constitutional significance of "dual" or *"de jure."* The District Court apparently acted under the impression that these particular phrases are talismanic and apply only to explicit segregation policies mandated by state law or local ordinance. *See, e.g.,* Pet. App. 11a-12a. On the first appeal, the Court of Appeals attempted to edify the District Court (Pet. App. 39a-69a). On the second appeal, the Court of Appeals merely made more explicit to the District Court (and the Petitioners) what it had held on the first appeal: the unconstitutional segregation practiced by the Dayton Board constitutes *de jure* (or illegal) segregation and renders the system "dual" (or unconstitutionally segregated). See Statement, *supra* at 5-6 and Pet. App., e.g., 89a-90a. In so many words, the Court of Appeals stated that in so-called "Northern" school segregation litigation, substance not semantics must govern the constitutional inquiry—the very message which this Court has previously made clear in *Keyes.* That the Court of Appeals in this case thus properly performed its appellate function with respect to one of its district courts presents *no* conflict or issue worthy of review by this Court.

404 U.S. 913 (1971); *Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1972), cert. denied, 413 U.S. 919 (1973); *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 920, 922 (1973); *Hart v. Community School Board*, 512 F.2d 37 (2nd Cir.), cert. denied, 417 U.S. 943 (1974); *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); and *cf. Milliken v. Bradley*, 418 U.S. 717, 738 n. 18 (1974).

3. Given the nature of the violation and the remand here, there is no merit to the Petitioners' effort to establish a conflict between the decision of the Court of Appeals and the Equal Educational Opportunities Act of 1974. The Court of Appeals held: "We construe the 1974 Act, read as a whole, as not limiting either the nature or scope of the remedy for constitutional violations in the instant case" (Pet. App. 95a). That statement cannot contravene an enactment which provides that

> the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

20 U.S.C. §1702(b). Cf. *Drummond v. Acree*, 409 U.S. 1228 (1972) (Powell, Circuit Justice).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied forthwith.

Respectfully submitted,

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